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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DONALD RENEE JONES, Defendant and Appellant.	F074330 (Super. Ct. No. VCF307814) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Kathryn T. Montejano, Judge.

Joshua L. Siegel, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Jeffrey A. White, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Donald Renee Jones challenges his conviction for assault with a deadly weapon and various enhancements. He contends DNA evidence was erroneously admitted at trial in violation of his right to confrontation under the Sixth Amendment to the United States Constitution.

We agree DNA evidence was erroneously admitted and conclude its admission was prejudicial. Accordingly, we reverse the judgment and remand for further proceedings.[1]

PROCEDURAL HISTORY

Appellant was charged with attempted murder (Pen. Code,[2] §§ 664, 187, subd. (a); count 1), and assault with a deadly weapon (§ 245, subd. (a)(1); count 2), both with additional special allegations, and two counts of resisting, obstructing, or delaying a peace officer (§ 148, subd. (a)(1); counts 3 and 4). The allegations arose out of the nonfatal stabbing of Deborah T.[3] and appellant's subsequent flight from pursuing officers.

At his first trial, the jury found appellant guilty on counts 3 and 4. As to counts 1 and 2, the jury remained deadlocked and the court declared a mistrial. Prior to appellant's second trial on counts 1 and 2, the People obtained the DNA evidence challenged in the instant appeal.

In appellant's second trial, the jury found him not guilty on count 1. However, the jury found appellant guilty on count 2 of assault with a deadly weapon and found true the allegation that appellant personally inflicted great bodily injury. (§ 12022.7, subd. (a).) In bifurcated proceedings, the court found true the allegations that appellant suffered two prior serious felonies and two prior prison terms.

On count 2, the court imposed a third-strike sentence of 25 years to life (§ 1170.12, subd. (c)(2)(A)(ii)), plus three years for the great bodily injury enhancement,

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1 In light of this disposition, we do not reach the issue of whether recent amendments to Penal Code section 667, subdivision (a) (Stats. 2018, ch. 1013, § 1, eff. Jan. 1, 2019) require remand to afford the trial court an opportunity to strike appellant's prior serious felony enhancements.

2 All further statutory references are to the Penal Code unless otherwise indicated.

3 To preserve the privacy of the victim and other percipient witnesses, we refer to them by their first names. No disrespect is intended.

and 10 years for two prior serious felony enhancements (§ 667, subd. (a)(1)), for a total term of 25 years to life plus 13 years. The remaining counts and special allegations were dismissed.

FACTUAL BACKGROUND

At approximately 8:15 p.m. on May 24, 2014, Deborah exited the upstairs portion of her duplex and saw her downstairs neighbor, Desiree F., involved in an altercation in the street with an unknown man. Deborah ran to the street and told the man to leave Desiree alone. The man hit Deborah in the face with his fist and she hit him back. Then, the man reached to the side of his leg, pulled out a knife, and stabbed Deborah in the stomach. The man fled to the east. When officers arrived, Deborah described her assailant as an African-American male wearing either a black or white shirt. Deborah was taken to the hospital, where she underwent surgery.

To the west of the altercation was a residence known to police. People were known to come and go from the residence and, following the incident, approximately 16 people were inside. In the yard of the residence, officers found a backpack containing appellant's driver's license, Social Security card, and EBT card. The backpack was on top of a folded-over mattress and the yard was littered with other debris. A knife was found on the ground, approximately two feet away from the backpack. The knife was inside a sheath that had a loop for attaching it to a belt. It was approximately nine inches long, including the handle.

Around midnight, officers in another part of town were informed "a subject [they] were looking for relating to a stabbing" was in the area and, shortly thereafter, appellant was observed running. Appellant initially evaded officers but eventually was apprehended.

The day after the incident, an officer showed Deborah a six-pack photo lineup. Although appellant was pictured in the lineup, Deborah did not identify him as her assailant; instead, she selected two other individuals as the possible assailant.

The People's Witnesses

At trial, Deborah identified appellant as her assailant. She also testified that, on the date of the incident and at the time of trial, she was on methadone and unspecified "psych meds." She admitted to having a prior conviction for "stealing."

Desiree also testified at trial. She explained, "I wake up drinking, I go to sleep drinking." She was "extremely drunk" on the night of the incident and also drank 40-ounces of beer at 7:30 a.m. on the morning of her trial testimony. As far as the stabbing, she recalled "getting in a[n] argument with somebody, and that's pretty much it." She could not recall what the argument was about or whether it was with appellant. She was aware Deborah had been stabbed but could not recall whether Deborah was stabbed in connection with the argument or even whether she saw Deborah that day.

An officer testified that, during booking, appellant stated, "I didn't stab that girl," before pausing for a few seconds and stating, "or that guy." The officer had not advised appellant of the victim's gender. According to the officer, appellant later asked about his backpack and stated, "If I would have stabbed her, I would have killed her." Appellant also claimed to carry a large knife.

The People's experts identified a dime-sized latent print on the handle of the knife found in the yard as being made by appellant's right palm. Human blood was found on the tip of the knife. As explained in detail below, the People's DNA expert testified the DNA profile in a swab taken from blood on the knife blade was consistent with Deborah's DNA profile.

The Defense Witnesses

A criminal investigator for the public defender's office testified he spoke with Deborah twice. On the first occasion, approximately two months after the incident, Deborah was unable to identify the person who stabbed her. About six months later, the investigator showed Deborah a photograph of appellant. However, Deborah stated she

previously identified the perpetrator in court and was not sure whether the photograph displayed the same person.

The defense also presented expert testimony from a psychologist regarding the "low level of reliability" of identification of strangers. The defense expert stated in-court identification is suggestive and therefore not a valid procedure for substantiating whether someone can identify a particular individual. The expert further stated stress, drugs, alcohol, the presence of a weapon, and the passage of time can all affect the accuracy of an eyewitness identification. Additionally, people are generally less accurate at identifying people of races other than their own.

DISCUSSION

The DNA analysis in this case was performed by analyst Christopher Johnson and admitted into evidence through the testimony of Scott Lewis, another analyst in the same laboratory. Appellant contends the admission of DNA evidence through this "surrogate" witness violated his Sixth Amendment right to confront witnesses. The People contend this argument is forfeited and, in any event, Lewis's testimony was permissible. Alternatively, the People contend the admission of the evidence was harmless.

We conclude that, even if forfeited, we must reach the issue on the merits. Doing so, we conclude Lewis's testimony regarding Johnson's analysis and the admission of Johnson's report violated the confrontation clause. Because this evidence was prejudicial, the conviction for assault with a deadly weapon must be reversed.

I. Additional Factual Background

Prior to appellant's second trial, the People brought a motion in limine seeking permission for Lewis to testify to results of the DNA analysis performed by Johnson. According to the People, Lewis could "competently testify to the results because he personally reviewed the DNA analysis during the review period prior to the release of the DNA report. The fact Scott Lewis did not personally conduct the analysis is immaterial as he reviewed the procedures and can competently testify to the accuracy of the results."

Defense counsel sought to exclude the DNA evidence on *Kelly/Frye*[4] and hearsay grounds.

In response, the prosecutor explained Johnson was "the analyst that actually analyzed the DNA sample" and Lewis "was the reviewer for that sample." According to the prosecutor, Lewis reviewed all of the "bench notes" and "the entire process" and "signed off on its accuracy." The prosecutor continued:

> "If the court recalls on Friday of last week, we had a pretrial where we were discussing scheduling issues, and I brought to the court's attention that Mr. Johnson would not be able to—to testify this week, as he has a training issue. The workaround that I was able to—to achieve was to get Mr. Lewis here instead.
>
> "If—if for some reason the court is not inclined to have—allow Mr. Lewis to testify in Mr. Johnson's place as the DNA expert, I would be asking for—to trail this case to the 60th day."

The court asked whether Lewis "would be testifying as an expert based on hypothetical questions that would be asked of him." The prosecutor responded affirmatively. The court stated it would allow Lewis "to testify as to the things he has knowledge of." Defense counsel then objected under Evidence Code section 352. After overruling the objection, the court ruled Lewis, if qualified as an expert, would be allowed to testify "as to DNA evidence."

At trial, Lewis was qualified as an expert in the field of DNA analysis. He testified he worked for the California Department of Justice at the Fresno Regional Laboratory as an assistant laboratory director. He confirmed he reviewed the DNA analysis that occurred in this case as a technical reviewer. At that point, defense counsel objected to further testimony in this regard on hearsay grounds because Lewis "did not perform the actual tests." The court ruled Lewis "will be able to rely on what he—

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[4] *People v. Kelly* (1976) 17 Cal.3d 24; *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013.

whatever materials he relied on in forming an opinion." Defense counsel stated, "I'm gonna [*sic*] object to that, as well." The objection was noted and overruled.

Lewis explained his laboratory uses an evidence tracking system in which each piece of evidence receives a barcode on its packaging, and the barcode is scanned and recorded each time the evidence is transferred between individuals or put into storage. In this case, DNA analysis was performed on "swabs that had been previously collected." The process of analyzing the DNA involved three steps: (1) extraction, where DNA is removed from the material; (2) quantification, where the amount of DNA recovered from the sample is measured; and (3) amplification and typing, where the recovered DNA is amplified and analyzed in an instrument. During this third step, the instrument analyzes the DNA fragments and produces a reading similar to an EKG from which the fragments of DNA can be measured. By comparing these results to a reference sample, the laboratory can determine whether "someone could or couldn't be the source of a particular sample." The prosecutor then questioned Lewis as follows:

> "Q. So in this case, what—what items were specifically analyzed for DNA?
>
> "A. The swabs that were analyzed in this case were swabs that had been previously collected from a knife, and then there were reference samples analyzed from two individuals.
>
> "Q. And was a comparison made in this case?
>
> "A. Yes. The—the—the evidence samples, the swabs that were collected from the knife resulted in profiles or results, and the profiles or results from the reference samples from the individuals were compared to one another to see if associations could be made as to whether or not those two individuals could or couldn't be the source of DNA on—on the swabs.
>
> "Q. And who are the individuals with the reference samples?
>
> "A. The individuals submitted in this case were from the victim in this case … and the suspect in the case, I believe the last name was Jones.

"Q. Was a—was a single profile found on the blood and on the knife?

"A. If I can refer to the report that was issued to refresh my memory.

"THE COURT: That will be fine.

"THE WITNESS: The first swab, which was listed as item one, was described as human blood from the knife blade, and the result for that particular sample was consistent with a single contributor, a female contributor, and that individual was consistent with the victim in this case, [Deborah]. Mr. Jones could not be the source of that particular sample.

"BY [PROSECUTOR]:

"Q. In reviewing the—the analysis and comparison in this case, were there any irregularities that happened?

"A. No, it was a relatively straightforward analysis. There wasn't anything that I noted that was irregular about it.

"Q. And based on the analysis and comparisons, what conclusions would you make?

"[DEFENSE COUNSEL]: I'll just note an objection for the record.

"THE COURT: All right. Overruled, and, counsel, I'm directing you to Evidence Code [sections] 801 and 802. [¶] … [¶]

"THE WITNESS: The results from the analysis in this case indicated that two of the results were consistent with a single source female profile. There[are] no mixtures in those two samples. Those two samples are consistent with [Deborah]. As they're from females, Mr. Jones is clearly eliminated.

"Two additional swabs that were collected from the knife resulted in partial results. One of them was a control swab from the blade. That partial result is also consistent with [Deborah], but it's not a full profile.

"The other swab that was collected from the knife was from the knife handle. That result is also a low[-]level partial result, and it's a mixture of at least two people, and no real conclusion can be made based on that result.

"BY [PROSECUTOR]:

"Q. Was a statistical analysis conducted regarding the—the degree of match between the victim and the blood on the knife?

"A. Yes, there was. [¶] … [¶]

"THE WITNESS: A statistical calculation is always given when an association is made between an evidence item and an individual's reference sample.

"In this case, the—the two items that provided a full profile, which would have been the human blood from the knife blade swab and the general swab of the knife blade, because that profile matched the profile from [Deborah's] reference, a calculation is given to provide some sort of weight to the match of those two profiles, and what the statistic indicates is if you were to select someone at random and test them, what is the chance they would happen to have the exact same profile as the evidence, okay.

"And so a statistical calculation was performed in this case, and the statistics in this case indicated that there would be about a one in 15 quintillion chance for African-Americans, about a one in 980 quadrillion chance for Caucasians and about a one in 6.8 quintillion chance for Hispanics, meaning if you were to select an individual from each of those ethnic backgrounds and test their blood, what would the chance their blood would match the evidence here. It's very slim chances, almost infinitesimally small chance they would match."

Lewis was asked to explain the steps taken to ensure the accuracy of the test results. He explained the laboratory's standardized procedures and control measures, then testified the control measures employed in this case showed accurate results. Lewis further explained, "the entirety of the work has to be technically reviewed, which is what I did, and then the report and all of the work has to be administratively reviewed where we sort of—T's are crossed, I's are dotted and pages are numbered. All of that has to occur before the report ever leaves the lab." Lewis testified the report was created immediately after the analysis was conducted, but it was not issued until "some point" after the technical and administrative reviews.

The report itself was admitted into evidence over defense counsel's hearsay objection. The report was also displayed on a screen for the jury while Lewis explained the information contained therein. Lewis testified the report contained a "summary table of DNA typing results," in which each sample occupied a column. Lewis explained how, "[a]s you go down the column, if the numbers are the same for reference sample and a piece of evidence, then you can't eliminate that person, and they're most likely the source of the evidence, and then a statistic calculation is given for the strength of the match." Thus, "immediately at the first location, Mr. Jones is eliminated as the source of that DNA, and [Deborah] cannot be eliminated at that point." The "conclusions of the analysis" or "summation paragraph" of the report also was displayed to the jury. This paragraph contained the report's statistical calculations.

On cross-examination, Lewis acknowledged he did not perform the DNA tests himself and was relying on another person's notes. He did not supervise the actions taken by the other analyst and was not in the room when the testing was performed. He did not examine any physical evidence.

Also, during cross-examination, Lewis explained various handwritten notes in the laboratory's case notes. Some of the notes reflected "the results from the quantification process … wherein the DNA recovered from the individual samples was measured. That information is entered on a spreadsheet, typed into a computer." Therein, "the analyst noted that the—the typed-in item numbers were auto corrected to I think some kind of date translation, and so he struck through them, initialed and added the handwritten item number for those samples." Lewis testified, "This is a part of the analyst's notes that formed the opinion of the report and all of the notes I reviewed during my technical review, and I agree with his opinion."

Lewis was also asked to review the "bench notes" and explain the data that was produced during the analysis. He explained an instrument produces an electropherogram, which records "peaks [that] correspond to DNA fragments as they pass through the

detector in the instrument." These "peaks" were labeled with the lengths of the DNA fragments. Numbers on the printout reflected "the number of repeats in that fragment" and "the height of the peak." Those numbers are generated by software in the instrument that compares the sample to an internal standard. The printout also contained a "table corresponding to some of the data that associate[d] with those peaks." The laboratory will also generate a "column or table" "as a summary" of the values for a particular sample. The values in that table are then compared to a reference sample to determine whether the numbers are the same. If the numbers are the same, the individual cannot be eliminated as a source of the DNA in the sample.

II. Forfeiture

In the trial court, appellant objected to Lewis's testimony and the admission of Johnson's report on hearsay grounds but did not raise a confrontation clause argument. The People therefore contend he forfeited this argument on appeal. Appellant contends the issue was adequately preserved and, to the extent it was not, counsel was ineffective. We conclude we must reach the issue on the merits.

Hearsay objections do not necessarily preserve a confrontation clause claim for appeal. (*People v. Rangel* (2016) 62 Cal.4th 1192, 1216–1217 ["A *Crawford* [*v. Washington* (2004) 541 U.S. 36 (*Crawford*)] objection generally requires a court to consider whether statements are testimonial, and, if so, whether a witness was unavailable and the defendant had a prior opportunity for cross-examination. This invokes different legal standards than, for example, a hearsay objection, which generally requires a court to consider whether the foundational requirements for admission of particular hearsay have been satisfied."].) Here, appellant's hearsay objection did not require the trial court to determine whether the alleged hearsay was testimonial, a critical distinction between ordinary hearsay and that which violates the confrontation clause. (*Crawford, supra*, 541 U.S. at pp. 68–69.) Thus, the objection did not require the court to apply the legal standard applicable to appellant's present challenge.

Our analysis, however, is somewhat complicated by a change in law that occurred after trial in this case. At the time of appellant's trial, then-prevailing law held experts could permissibly testify to the information they relied on in forming their opinion, even if that testimony would otherwise constitute inadmissible hearsay. (E.g., *People v. Gardeley* (1996) 14 Cal.4th 605, 618–620 (*Gardeley*).) Under this rationale, such expert basis testimony was not offered for its truth, but only to identify the foundational basis for the expert's testimony, and therefore did not implicate the hearsay rule or the confrontation clause. (*Ibid.*; *People v. Valadez* (2013) 220 Cal.App.4th 16, 30.) The trial court apparently relied on this rule in overruling appellant's hearsay objection, stating Lewis could permissibly testify to "whatever materials he relied on in forming an opinion."

Three months after appellant's trial, our Supreme Court issued its decision in *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*), which determined the trier of fact necessarily considers expert basis testimony for its truth when evaluating the expert's opinion, and such testimony therefore implicates the hearsay rule and the confrontation clause. (*Id.* at p. 684.) Thus, "[w]hen any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay." (*Id.* at p. 686.) If the statements are also testimonial, their admission violates the confrontation clause unless "(1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing." (*Ibid.*)

The Courts of Appeal presently are divided on the question of whether the failure to object on hearsay or confrontation clause grounds in a proceeding held prior to *Sanchez* forfeits the issue on appeal. (See *People v. Blessett* (2018) 22 Cal.App.5th 903, 929 [hearsay and confrontation clause claims forfeited], review granted Aug. 8, 2018, S249250; *People v. Perez* (2018) 22 Cal.App.5th 201, 211–212 [*Sanchez* was not a significant change in law that excused counsel's failure to object at trial], review granted

Jul. 18, 2018, S248730; but see *People v. Flint* (2018) 22 Cal.App.5th 983, 996–998 [hearsay claim not forfeited because objections would have been futile]; *People v. Jeffrey G.* (2017) 13 Cal.App.5th 501, 507–508 [same].)

We need not resolve this split of authority here because appellant argues in the alternative that failure to object on confrontation clause grounds constituted ineffective assistance of counsel. " '[A] defendant claiming a violation of the federal constitutional right to effective assistance of counsel must satisfy a two-pronged showing: that counsel's performance was deficient, and that the defendant was prejudiced, that is, there is a reasonable probability the outcome would have been different were it not for the deficient performance.' " (*People v. Woodruff* (2018) 5 Cal.5th 697, 736.) "Rarely is ineffective assistance of counsel established on appeal since the record usually sheds no light on counsel's reasons for action or inaction." (*Ibid.*) Here, however, it is difficult to discern a reasoned basis for counsel's failure to object on confrontation clause grounds given his frequent assertion of hearsay objections. Thus, even assuming this argument is waived, we must consider the issue on the merits to determine whether appellant was prejudiced by the lack of objection.

III. Legal Standards Applicable to Confrontation Clause Claims

"[T]he Sixth Amendment to the federal Constitution gives a criminal defendant the right to confront and cross-examine adverse witnesses." (*People v. Lopez* (2012) 55 Cal.4th 569, 576 (*Lopez*).) In *Crawford*, the United States Supreme Court held the confrontation clause bars the introduction of "testimonial" hearsay against a defendant unless the witness is unavailable to testify, and the defendant had a prior opportunity for cross-examination. (*Crawford*, *supra*, 541 U.S. at p. 68; see *Lopez*, *supra*, 55 Cal.4th at p. 576.) "Subsequent decisions by the high court and [our Supreme Court] have sought to clarify what a 'testimonial' statement is in the context of written reports documenting scientific testing." (*People v. Amezcua and Flores* (2019) 6 Cal.5th 886, 912.) "A comprehensive definition of the term 'testimonial' awaits articulation." (*Ibid.*)

However, *Crawford* articulated a "core class of 'testimonial' statements" covered by the confrontation clause, including " 'ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,' [citation]; 'extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,' [citation]; [and] 'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.' " (*Crawford, supra,* 541 U.S. at pp. 51–52.)

Subsequently, in *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305 (*Melendez-Diaz*), the Supreme Court considered whether three " 'certificates of analysis,' " which were sworn to before a notary public and later admitted at trial to show material recovered from the defendant contained an illegal drug, were testimonial. (*Id.*, at p. 308.) In a five-to-four decision, a majority of the Supreme Court concluded the certificates were within the " 'core class of testimonial statements' " described in *Crawford* because they were affidavits, made for the purpose of establishing the substance in the defendant's possession was cocaine, and therefore "functionally identical to live, in-court testimony …." (*Id.* at pp. 310–311.) Moreover, the court found relevant the fact the certificates were made pursuant to a statute that authorized their use as evidence at trial, indicating they were made under circumstances which would lead an objective witness reasonably to believe they would be so available.[5] (*Id.* at p. 311.)

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[5] Justice Thomas signed the majority opinion in *Melendez-Diaz*, but also wrote separately to express his view that " 'the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.' " (*Melendez-Diaz, supra*, 557 U.S. at p. 329 (conc. opn. of Thomas, J.).) Because the laboratory certificates at issue were affidavits, Justice Thomas concluded, their use against the defendant violated his right to confrontation. (*Id.* at p. 330.)

Subsequently, in *Bullcoming v. New Mexico* (2011) 564 U.S. 647 (*Bullcoming*), the United States Supreme Court considered the admission of a report regarding the defendant's blood-alcohol level, which included a " 'certificate of reviewer' " certifying the analyst was qualified to conduct the test and that established procedures had been followed. (*Id.* at p. 653.) The report was admitted into evidence through a surrogate analyst "who was familiar with the laboratory's testing procedures, but had neither participated in nor observed the test on Bullcoming's blood sample." (*Id.* at p. 651.) The court, in another five-to-four decision, rejected the notion the report was nontestimonial stating, "A document created solely for an 'evidentiary purpose,' … made in aid of a police investigation, ranks as testimonial." (*Id.* at p. 664.) Although the certification was unsworn and unnotarized, the court concluded it was materially indistinguishable from the affidavit in *Melendez-Diaz* and was sufficiently formal to rank as testimonial. (*Id.* at pp. 664–665.)

In a concurring opinion, Justice Sotomayor pointed out *Bullcoming* was "not a case in which the person testifying is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue." (*Bullcoming*, *supra*, 564 U.S. at pp. 672–673 (conc. opn. of Sotomayor, J.).) According to Justice Sotomayor, "[i]t would be a different case if, for example, a supervisor who observed an analyst conducting a test testified about the results or a report about such results." (*Id.* at p. 673.) Additionally, Justice Sotomayor pointed out *Bullcoming* was not a case "in which an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence." (*Ibid.*) "We would face a different question if asked to determine the constitutionality of allowing an expert witness to discuss others' testimonial statements if the testimonial statements were not themselves admitted as evidence." (*Ibid.*)

Soon after *Bullcoming*, a fractured United States Supreme Court decided *Williams v. Illinois* (2012) 567 U.S. 50 (*Williams*). There, the prosecution's expert

witness testified other analysts had tested vaginal swabs, derived a DNA profile of the man whose semen was on the swabs, and sent the state criminal laboratory a report containing that profile. (*Id.* at pp. 56–57.) In the expert's opinion, the profile matched that of the defendant, which had been developed by the state criminal laboratory based on a blood sample taken from the defendant when he was arrested on an unrelated offense. (*Id.* at pp. 56, 59.)

Justice Alito wrote the plurality opinion in *Williams*, which was joined by Justices Roberts, Kennedy, and Breyer. The plurality observed: "Out-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause. Applying this rule to the present case, we conclude that the expert's testimony did not violate the Sixth Amendment." (*Williams, supra*, 567 U.S. at pp. 57–58 (plur. opn. of Alito, J.).) Alternatively, the plurality concluded the report was not testimonial because it was not prepared "for the primary purpose of accusing a targeted individual." (*Id.* at p. 84.) Indeed, the defendant was not yet a suspect at the time the report was produced. (*Id.* at pp. 84–85.)

Justice Thomas concurred in the result but not the plurality's reasoning. In a separate opinion, he rejected the plurality's conclusion the statements were not offered for the truth of the matters asserted therein. (*Williams, supra,* 567 U.S. at pp. 104–109 (conc. opn. of Thomas, J.).) He also rejected the plurality's conclusion the laboratory report was not testimonial because it was prepared mainly to find a yet unidentified rapist. That rationale, Justice Thomas said, "lacks any grounding in constitutional text, in history, or in logic." (*Id.* at p. 114.) Instead, Justice Thomas concluded the report was not testimonial because the laboratory's statements "lacked the requisite 'formality and solemnity' to be considered ' "testimonial" ' for purposes of the Confrontation Clause." (*Id.* at pp. 104–105.)

The four-justice dissent, written by Justice Kagan, agreed with Justice Thomas that the statements in the report were admitted for their truth. (*Williams*, *supra*, 567 U.S. at pp. 125–130 (dis. opn. of Kagan, J.).) The dissent likewise rejected the plurality's conclusion the statements were not testimonial because they were not prepared for the purpose of targeting a specific individual. (*Id.* at pp. 135–136.) However, unlike Justice Thomas and the plurality, the dissent concluded the statements were testimonial under the court's reasoning in *Melendez-Diaz* and *Bullcoming.* (*Id.* at pp. 139–141.)

Soon thereafter, our Supreme Court applied *Williams* in two cases, *Lopez*, *supra*, 55 Cal.4th 569, and *People v. Dungo* (2012) 55 Cal.4th 608 (*Dungo*). *Lopez* involved a vehicular manslaughter prosecution. There, a criminalist testified his nontestifying colleague had analyzed a sample of the defendant's blood and determined his blood alcohol level was 0.09 percent. The testifying criminalist also reached the same conclusion "based on his own 'separate abilities as a criminal analyst.' " (*Lopez*, *supra*, at p. 574.) The nontestifying analyst's report was admitted into evidence. (*Ibid.*) The report was comprised of chain of custody information, machine-generated data, and the analyst's notations linking a particular sample number to the defendant. (*Id.* at pp. 582–584.)

To determine whether the report was testimonial, the majority in *Lopez* set out the following criteria: "First, to be testimonial the out-of-court statement must have been made with some degree of formality or solemnity." (*Lopez*, *supra*, 55 Cal.4th at p. 581.) Second, "an out-of-court statement is testimonial only if its primary purpose pertains in some fashion to a criminal prosecution …." (*Id.* at p. 582.) Under *Lopez*, both criteria must be met before a statement may be deemed testimonial. (See *ibid.*) The majority opinion concluded the report was not sufficiently formal to constitute testimonial hearsay because the analyst's notations were "nothing more than an informal record of data for internal purposes." (*Id.* at pp. 582–585.) A concurrence that received majority support further concluded the "demands of the confrontation clause" were satisfied "by calling a

well-qualified expert witness to the stand, available for cross-examination, who could testify to the means by which the critical instrument-generated data was produced and could interpret those data for the jury, giving his own, independent opinion as to the level of alcohol in defendant's blood sample." (*Id.* at p. 587 (conc. opn. of Werdegar, J.).)

In *Dungo*, a pathologist relied on the report of a nontestifying autopsy surgeon to opine a murder victim had been strangled. (*Dungo*, *supra*, 55 Cal.4th at p. 614.) The report was not admitted into evidence. A majority of our Supreme Court concluded the autopsy report was not sufficiently formal to qualify as testimonial in part because it "merely record[ed] objective facts" and was akin to a physician's report. (*Id.* at p. 619.) Additionally, criminal investigation was only one of many purposes of the report, rather than the primary purpose. (*Id.* at pp. 619, 621.)

More recently, in *Sanchez*, our Supreme Court abandoned its prior rule that permitted expert witnesses to testify to out-of-court statements upon which they had relied in forming their opinions, even if the statements were otherwise inadmissible under the hearsay rule. (*Sanchez*, *supra*, 63 Cal.4th at p. 680.) That rule was premised on the proposition, repudiated by a majority of justices in *Williams*, that such evidence was not offered for its truth, but only to identify the foundational basis for the expert's testimony. (E.g., *Gardeley*, *supra*, 14 Cal.4th at pp. 618–620.) Like *Lopez* and *Dungo*, *Sanchez* once again emphasized that, in determining whether an out-of-court statement qualifies as testimonial, we look to the formality of the statement and its primary purpose. (See *Sanchez*, at pp. 694–698.)

IV. Analysis

We address the admissibility of Johnson's report before examining Lewis's testimony. We then consider whether appellant was prejudiced by improperly admitted evidence.

A. Johnson's Report

Johnson's report of DNA testing was admitted into evidence through Lewis's testimony. It also was displayed to the jury while Lewis explained the information contained therein. Appellant contends admission of the report violated his rights under the confrontation clause. The People seem to contend portions of the report were admissible to the extent they contained "objective" or raw data. Alternatively, the People contend, admission of the report was harmless. We conclude the report was testimonial and therefore inadmissible through Lewis's testimony. We address harmlessness separately below after reviewing all the contested evidence.

We first conclude the report was sufficiently formal to qualify as testimonial. It bore the following declaration, attested to by Johnson:

> "I, the undersigned, declare under penalty of perjury: (1) I am employed by the State of California, Department of Justice (DOJ), Bureau of Forensic Services; (2) I conducted an examination of the material described below in the ordinary course of my work as a qualified examiner, according to approved laboratory procedures that include creation of contemporaneous documentation and the technical review of my work; (3) The observable data is set forth in the associated laboratory case record; (4) Any opinions, interpretations, or conclusions in this report are based upon data in the associated laboratory case record and findings listed below."

The declaration constitutes a " ' "solemn declaration or affirmation made for the purpose of establishing or proving some fact," ' " which brings the report within the " 'core class of testimonial statements' " articulated in *Crawford*.[6] (*Melendez-Diaz*, *supra*, 557 U.S. at p. 310; see *Crawford*, *supra*, 541 U.S. at p. 68.) The declaration affirmed proper procedures were followed and the report's conclusions were supported by an associated data set. In this regard, the report stands as a surrogate for testimony Johnson would have been expected to give had he been called at trial. The report is "functionally identical to

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[6] The People contend the report was not testimonial because it was not executed under oath. However, it was attested to "under penalty of perjury."

live, in-court testimony, doing 'precisely what a witness does on direct examination.' " (*Melendez-Diaz, supra,* at pp. 310–311.) Although the People attempt to diminish the import of this sworn statement, they cite no case in which a declaration made under penalty of perjury has been found insufficiently formal to qualify a report as testimonial.

The second criteria of whether a scientific report is testimonial is whether the primary purpose of the report relates to criminal prosecution. (*Lopez, supra,* 55 Cal.4th at pp. 581–582.) Here, the primary purpose of the report was plainly to aid in appellant's prosecution. Indeed, that was the report's *only* purpose. The report was obtained after the People failed to obtain a verdict of guilt at appellant's first trial. The report's sole purpose was to bolster the prosecution's claim a knife associated with appellant was used in the instant offense. The report therefore was prepared "for the primary purpose of accusing a targeted individual." (*Williams, supra,* 567 U.S. at p. 84; see *Dungo, supra,* 55 Cal.4th at pp. 619, 621.)

Nonetheless, the People contend the report is not testimonial because it merely reported "objective facts." This is not one of the criteria our Supreme Court has set out for determining whether a scientific report is testimonial.[7] (*Lopez, supra,* 55 Cal.4th at pp. 581–582.) It is true that, in *Dungo,* our Supreme Court held testimony regarding an autopsy report that contained "objective facts" regarding the condition of a victim's body was not sufficiently formal to constitute testimonial hearsay. (*Dungo, supra,* 55 Cal.4th at p. 619.) The report itself, however, was not admitted into evidence. (*Id.* at pp. 618–619; *People v. Leon* (2015) 61 Cal.4th 569, 604 (*Leon*) [distinguishing *Dungo* on ground report was not admitted into evidence].) Additionally, that report lacked other indicia of formality and was not made with the primary purpose of aiding in criminal investigation

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[7] Additionally, the United States Supreme Court has rejected the proposition that the testimonial statement of one witness who "recorded an objective fact" may be entered into evidence through the in-court testimony of a second witness. (*Bullcoming, supra,* 564 U.S. at p. 660.)

or prosecution. (*Dungo, supra,* at pp. 619–621.) Thus, *Dungo* does not hold a testimonial report loses its testimonial quality simply because some of the information it contains is "objective." In any event, Johnson's report is not a mere record of "objective facts." The raw data underlying the report was contained in separate "bench notes," which were not admitted into evidence. The report itself contains Johnson's conclusions and statistical analysis, which our Supreme Court has described as being more formal than a "record [of] objective facts." (*Id.* at p. 619.) Even if some of the information contained within the report qualifies as "objective," the report itself remains testimonial hearsay.

In sum, the report constitutes testimonial hearsay. Johnson did not testify at trial. The People do not contend he was unavailable to testify or that appellant had a prior opportunity for cross-examination. Accordingly, the court erred in admitting the report into evidence.

B. Lewis's Testimony

A more difficult question is the extent to which Lewis could permissibly testify regarding the DNA evidence. Of course, as a qualified expert in DNA analysis, he could permissibly testify to "background information" regarding DNA analysis and "premises generally accepted in his field." (*Sanchez, supra,* 63 Cal.4th at p. 685.) He also could permissibly rely on Johnson's hearsay report in forming his own opinion and could tell the jury in general terms that he did so. (*Ibid.*) What Lewis could not do was relate as true hearsay statements contained within the report. (*Id.* at p. 686.) We conclude this is precisely what occurred here.

There can be little question Lewis's testimony brought substantial testimonial hearsay before the jury. Significant portions of Johnson's report were displayed for the jury while Lewis explained the information contained therein. For example, Lewis explained how Johnson's "summary table of DNA typing results" showed Deborah could not be eliminated as the source of the DNA on the knife. Lewis similarly discussed

Johnson's conclusions and statistical calculations. Such testimony related testimonial hearsay. (*Leon*, *supra*, 61 Cal.4th at p. 603 ["The hearsay problem arises when an expert simply recites portions of a report prepared by someone else, or when such a report is itself admitted into evidence."].)

Furthermore, frequent references to Johnson's report by both Lewis and the prosecutor during questioning make it difficult to conclude Lewis's opinion testimony regarding the DNA evidence reflects his own opinions, rather than Johnson's. Much of Lewis's testimony regarding the results appears to have been taken, almost verbatim, from Johnson's report. When asked to provide specific conclusions regarding the DNA evidence, Lewis referred to Johnson's report to refresh his own recollection. Indeed, we find only one instance in which Lewis attempted to relate his own view of the DNA evidence to the jury. On cross-examination, he was asked whether he reviewed Johnson's handwritten notes in forming his opinion or in testifying. In response, Lewis stated, "This is a part of the analyst's notes that formed the opinion of the report and all of the notes I reviewed during my technical review, and *I agreed with his opinion*." (Emphasis added.) In other words, Lewis's own opinion testimony was conveyed only with reference to his agreement with Johnson.

The above statement is also the only point in the testimony in which Lewis described his role as technical reviewer. Thus, there is no basis in the testimony to conclude Lewis had special knowledge of the testing that would permit him to testify regarding the contents of Johnson's report. As noted above, there may be some leeway for a reviewer "who observed an analyst conducting a test" to testify about the results or a report of such results. (*Bullcoming*, *supra*, 564 U.S. at pp. 672–673 (conc. opn. of Sotomayor, J.).) Here, however, Lewis did not observe the testing or examine any physical evidence. He was in no different position than any other similarly qualified expert who formed an opinion based on the paper record.

During motions in limine, the prosecutor represented Lewis could competently testify to the DNA analysis because he reviewed all of the "bench notes" and "the entire process" and "signed off on its accuracy." It may be Lewis could have competently testified to raw, machine-generated or "objective" data contained in the report's "bench notes," and from that information could have independently opined the blood on the knife matched Deborah's DNA profile. Indeed, the court initially ruled Lewis could testify "to the things he has knowledge of" indicates the court may have anticipated just such testimony. Ultimately, however, Lewis did not so testify.

Surrogate testimony of the kind presented here does not meet constitutional requirements. (*Bullcoming*, *supra*, 564 U.S. at p. 652; *Leon*, *supra*, 61 Cal.4th at p. 603.) The court erred in permitting Lewis to testify regarding Johnson's testimonial statements.

C. Harmlessness

"Violation of the Sixth Amendment's confrontation right requires reversal of the judgment against a criminal defendant unless the prosecution can show 'beyond a reasonable doubt' that the error was harmless." (*People v. Rutterschmidt* (2012) 55 Cal.4th 650, 661; see also *Chapman v. California* (1967) 386 U.S. 18.) " 'We ask whether it is clear beyond a reasonable doubt that a rational jury would have reached the same verdict absent the error.' " (*People v. Livingston* (2012) 53 Cal.4th 1145, 1159.) In other words, we ask " 'whether the … verdict actually rendered in this trial was surely unattributable to the error.' " (*People v. Edwards* (2013) 57 Cal.4th 658, 773.) Here, we cannot conclude the admission of testimonial hearsay was harmless beyond a reasonable doubt.

This is not a case where the erroneously admitted evidence was cumulative or irrelevant, or where the evidence against the defendant was otherwise overwhelming.[8]

[8] We note, however, that no party argues the evidence was insufficient to permit a finding of guilt beyond a reasonable doubt. Accordingly, retrial on this count is not precluded. (*People v. Venegas* (1998) 18 Cal.4th 47, 94–95.)

(See, e.g., *People v. Penunuri* (2018) 5 Cal.5th 126, 158 [erroneously admitted evidence "added little if anything to the properly admitted evidence"]; *Leon, supra,* 61 Cal.4th at p. 604 [evidence was irrelevant]; *People v. Rutterschmidt, supra,* 55 Cal.4th at p. 661 [evidence of guilt was overwhelming].) The identity of Deborah's assailant was the primary issue at trial. Aside from the DNA evidence, the strongest evidence of identity was Deborah's in-court identification of appellant. However, the effect of this identification may have been diminished by Deborah's failure to identify appellant in any of several out-of-court opportunities, and the testimony of a defense expert who called into question the validity of her in-court identification.

In addition to this evidence, a knife bearing appellant's palm print was found near the scene of the offense. However, the knife was found to the west of the stabbing; the assailant was described as having fled to the east. The knife also was found in a yard littered with other debris. Although blood was found on the tip of the knife, there is little to connect the knife to the instant offense absent a match to Deborah's DNA profile.

Other evidence appellant committed the offense is similarly attenuated. Appellant told an officer, "I didn't stab that girl," before pausing a few seconds and stating, "or that guy." The People implied appellant only knew the gender of the victim because he had been the perpetrator. Additionally, approximately four hours after the incident, appellant was seen running in another area of town, and he then ran from police officers. Although the jury could have concluded appellant's effort to avoid arrest reflected consciousness of guilt, this evidence certainly cannot be characterized as overwhelming. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1055.)

The fact a jury presented with substantially the same evidence could not reach a unanimous verdict further reflects this was a close case. (*People v. Rivera* (1985) 41 Cal.3d 388, 393, fn. 3 [ascribing significance to prior hung jury when considering prejudice of an error on retrial], overruled on other grounds by *People v. Lessie* (2010) 47 Cal.4th 1152, 1168, fn. 10; *People v. Mullens* (2004) 119 Cal.App.4th 648, 669

[stressing prior hung jury in rejecting the state's harmlessness contention]; *U.S. v. Paguio* (9th Cir. 1997) 114 F.3d 928, 935 ["We cannot characterize the error as harmless, because the hung jury at the first trial persuades us that the case was close and might have turned on this evidence."].)

The DNA evidence was the sole evidence connecting a knife associated with appellant to the instant offense. On these facts, we cannot conclude the DNA evidence was harmless beyond a reasonable doubt.

DISPOSITION

The judgment is reversed, and the matter is remanded for further proceedings consistent with this opinion.

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HILL, P.J.

WE CONCUR:

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DETJEN, J.

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SNAUFFER, J.